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UNDER THE UNCITRAL ARBITRATION RULES AND THE NORTH AMERICAN FREE TRADE AGREEMENT

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant / Investor

-AND-

GOVERNMENT OF CANADA

Respondent / Party

INVESTOR'S RESPONSE TO CANADA'S SUBMISSION ON THE FILING OF A STATEMENT OF DEFENCE

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The Investor makes the following submission in response to Canada's Memorandum of Argument concerning the Submission of its Statement of Defence. This submission does not address the alleged jurisdictional issues raised by Canada in its "Notice of Motion".

Summary of the Investor's Argument

Canada has provided no justification that would warrant this Tribunal further delaying the submission by Canada of a Statement of Defence. The fair and timely resolution of this proceeding requires that Canada file its Statement of Defence within thirty days. If it does not do so, then the forward progress of this arbitration will be further delayed.[1]

The Investor's argument can be summarized as follows:

a) The architecture of the applicable arbitral rules and the weight of international arbitral precedent and practice do not support Canada's position;

b) Canada's assertions that the Investor's Claim does not meet the requirements for a Statement of Claim under the UNCITRAL Arbitration Rules and the NAFTA are without merit; and

c) It is important for the orderly resolution of these proceedings that all jurisdictional objections be identified at this time rather than to allow Canada to raise some objections now and others when it files a Statement of Defence. Filing a Statement of Defence will ensure all jurisdictional questions are articulated now.

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1 Canada first indicated its intention to raise jurisdictional issues nine months ago; but it is only with the filing of its submission on this motion that those issues have even been partially articulated.

Argument

1. Canada's Memorandum of Argument regarding the Submission of its Statement of Defence ("Canada's Submission") purports to identify jurisdictional issues which Canada relies on in support of its argument that it should not be required to file a Statement of Defence at this time. Carefully analysed, Canada's Submission does not disclose any reasons which justify its position. Rather, the matters raised by Canada relate to substantive issues that the Tribunal may be called on, on application by Canada, to address in the future. Nothing in those submissions impairs the ability of Canada to file a defence.

2. The architecture of the UNCITRAL Rules provides for a simple process of adjudication. A Tribunal may order a close of the pleadings (if necessary) and then proceed to determine whether it should rule on preliminary objections, or proceed to a hearing on the merits. To ensure that arbitral proceedings move forward with reasonable dispatch, Article 23 of the UNCITRAL Rules establishes general time limits for written submissions such as the Statement of Defence: Article 19 of the UNCITRAL Rules invests the Tribunal with the authority to order production of the Statement of Defence on a timely basis: and Article 21 of the UNCITRAL Arbitration Rules permits the Tribunal to use a preliminary hearing to address dispositive issues before proceeding to address the merits. These provisions work in harmony to allow claims to proceed in a timely and effective manner.

3. In order to bring a claim under Article 18(2) of the UNCITRAL Arbitration Rules and Article 1116(1) of the NAFTA, an Investor of a NAFTA Party must file a Statement of Claim that includes at least the following:

   a) the names and addresses of the parties;
   b) a basic statement of facts supporting the claim;
   c) the relief and remedy sought: and
   d) An allegation that the claimant (as an investor of a NAFTA Party) has suffered loss or damage by reason of, or arising out of, a breach of Section A of Chapter 11 or NAFTA Articles 1503(2) or 1502(3)(a) by another NAFTA Party.

   The Investor's Statement of Claim satisfies each of these basic requirements. As a result, this Tribunal has been invested with the authority to commence the determination of the Investor's Claim.

4. International arbitral precedent and practice are against Canada's position, despite Canada's assertion to the contrary.[2] It is telling that Canada has not provided any academic or arbitral

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2 Canada's Submission on the Statement of Defence at para: 12.

support for its arguments. The Investor submits that Canada cannot provide support for its position as Canada's contention is fundamentally incorrect.[3] A review of the claims decided under the NAFTA illustrates how the general approach adopted by these international Tribunals is consistent with the Investor's position:

a) In *Re S.D. Myers, Inc.* and the *Government of Canada*, Canada sought to have the Tribunal order the Investor to produce "particulars" of what Canada argued was an insufficient Statement of Claim. Canada argued that it could not provide a Statement of Defence until it received further detail from the Investor. This would have delayed filing of the Defence by many months. The Tribunal rejected Canada's argument and ordered delivery of its Statement of Defence within 30 days[4].

b) In *Re: Ethyl Corporation* and the *Government of Canada*, Canada was ordered to deliver its Statement of Defence within forty-five days of the Tribunal's first procedural meeting. The Tribunal subsequently held a preliminary hearing to consider arguments Canada referred to as being "jurisdictional" which it had raised in its Statement of Defence[5].

c) In *Re: Pope & Talbot* and the *Government of Canada*, Canada first delivered its Statement of Defence and then the Tribunal considered two of Canada's jurisdictional issues on a preliminary basis.

d) In *Re: Methanex Corp* and the *Government of the United States of America*, the United States was ordered to deliver its Statement of Defence by the Tribunal's very first procedural order[6]. The United States' Statement of Defence also included various defences and other concerns that it termed as "jurisdictional."

In summary, it is clear that the natural order of a NAFTA/UNCITRAL arbitration contemplates that the pleadings shall be closed before a Tribunal entertains whether a preliminary hearing will be necessary.

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3 See para. 5 of the Investor's Submission on the Filing of the Statement of Defence for specific case references.

4 *Procedural Order No. 1* at para. 4.

5 *Procedural Order*, October 13, 1997, at para. 8(a).

6 *Methanex and the Government of the United States of America*, Minutes of Order of The First Procedural Meeting Held on Thursday, 29 June, 2000 at 4.

5. Thus, when Canada asserts that "the weight of international arbitration precedent and practice, together with the UNCITRAL Rules, supports [sic] the resolution of jurisdictional objections to a Statement of Claim prior to filing a Statement of Defence"[7], the fact is that neither the applicable arbitral precedents, nor the UNCITRAL Rules, do so. There is nothing in the practice of arbitral tribunals that prevents an arbitral tribunal from addressing jurisdictional questions subsequent to the filing of a defence and either together with or prior to the resolution of the merits of the proceeding.

6. There is absolutely no reason why the jurisdictional objections Canada has now raised cannot be raised in the form of a Statement of Defence. Indeed, in paragraphs 27 and 28 of Canada's Submission, it articulates, in part, the defences it wishes to raise. In paragraphs 5 through 10 of its Submission on Place of Arbitration, Canada has demonstrated that it is capable of understanding and responding to the Investor's claim. Both Canada's Submission and its Motion demonstrate that Canada is well aware of the case against it. Accordingly, there is no reason why Canada cannot now provide its Statement of Defence.

7. Canada asserts, but cites no support for the proposition, that the practice in international arbitration is for Tribunals to suspend the proceedings on the merits when a jurisdictional objection is raised[8]. Indeed, Canada knows from its own experience in other NAFTA investor-state arbitrations that the contrary practice in fact occurs[9].

8. Nor does Canada provide any authority for the proposition that there is no obligation on it to provide a Statement of Defence where one party alleges that the claim is insufficiently "precise or particular". If there were support for that proposition, presumably Canada would have provided it.

9. Indeed, in that regard, Canada's position in respect of filing its defence is entirely novel. It seems to assert that because the Claimant has given more comprehensive notice of the facts on which it relies, it is somehow difficult for Canada to plead in response. Canada can, however, without difficulty, either admit each fact, deny it, explain it, or plead that it does not support the Claimant's position. Its lack of desire to do so should not justify a failure to file its pleading. Nor should the Tribunal give weight to Canada's reliance on its own municipal case law

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7 See paragraph 12 of Canada's Submission.

8 See paragraph 31 of Canada's Submission.

9 The *Ethyl, Pope & Talbot* and *Myers* claims discussed above demonstrate the ordinary route followed by international Tribunals when a disputing Party raises a jurisdictional issue arising out of the originating pleading. In the *Pope & Talbot* case, jurisdictional matters were addressed almost 10 months after the filing of Canada's Statement of Defence, in the *Award on Motion to Strike Claims*, August 7, 2000.

respecting pleading under the federal court rules[10]. This arbitration is conducted under the NAFTA and the UNCITRAL Arbitration Rules. The case law derived from Canadian courts is wholly irrelevant to the determinations made by this Tribunal under international law pursuant to NAFTA Article 1135.

10. Additionally, Canada's submissions with respect to conditions precedent to arbitration are without merit.[11] Canada seeks to raise as a requirement of pleading that the Claimant negate a possible defence that might be raised by Canada. If Canada thinks that either six months have not elapsed, under NAFTA Article 1120, or that more than three years have since the investor became aware of the breaches, then those are defences that Canada can raise. They are not in any sense a jurisdictional precondition that must be established by pleading, as Canada asserts.

11. Canada cites the jurisdiction decision[12] in the NAFTA Chapter 11 claim *Re: Waste Management, Inc.* and *Mexico*, to support the general proposition that "the failure of the Investor to meet *prima facie* conditions precedent in NAFTA Chapter Eleven deprives arbitral tribunals of jurisdiction to hear its claim under NAFTA Chapter Eleven." Contrary to Canada's argument, this decision does not address or support such a general proposition. Rather, the Tribunal simply addressed the specific question of the sufficiency of the Investor's waiver and consent under NAFTA Article 1121.

12. Moreover, other NAFTA Tribunals have explicitly rejected the *Waste Management* Tribunal's approach on the question of whether the waiver and consent is a pre-condition to a NAFTA Chapter 11 arbitration.[13] Accordingly, the Investor submits that no weight should be given to

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10 See footnote 4 of Canada's Submission. The *Weatherall* case relied on by Canada dealt with the legality under Canadian law of female prison guards strip searching male inmates. The *Murray* case dealt with a particularly litigious plaintiff, filing an unusual pleading. In the result, the Court did not strike the pleading, but allowed it to be filed. Neither case assists Canada.

11 See paragraphs 38 to 49 of Canada's Submission.

12 See paras 42-43 of Canada's Submission.

13 The decision of the *Waste Management* majority stands in stark contrast to the dissenting opinion of the third member of this Tribunal, as well as the decisions of two other Tribunals on this issue, *Pope & Talbot* and *Ethyl*. The majority approach in *Waste Management* was rejected by the third Tribunal member, the Prof. Keith Highet, in a detailed and persuasive dissenting opinion. (Highet Dissenting Opinion, www.worldbank.org/icsid/cases/waste_diss.pdf.) Similarly, the *Pope & Talbot* Tribunal supported the position of the *Ethyl* Tribunal that in no manner was the execution of a waiver a precondition to arbitration. (*Pope & Talbot* v, *Canada*, Award in the Harmac Motion, February 24, 2000 at para.13-16: *Ethyl Corp.* v. *Canada*, Award on Jurisdiction, June 24, 1998) A para. 91 the Tribunal states: "While Article 1121's title characterizes its requirements as 'Conditions Precedent,' it does not say to what they are precedent. Canada's contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121, which must govern."

the *Waste Management* decision with respect to the issue of pre-conditions to this Tribunal's jurisdiction.

13. While it is not the place of this submission to address jurisdictional arguments, Canada does make certain assertions which implicitly go to the jurisdiction of the Tribunal. For instance, it argues that the Investor's allegations of loss must be extremely detailed (i.e. that they must be explained specifically in relation to each individual allegation of breach). Again, such assertions are consistent neither with international law nor practice. To commence an arbitration, it is only necessary for an investor to allege that loss has occurred in its Notice of Arbitration and/or its Statement of Claim. The issue of how much loss can be apportioned to a particular breach, if proved, is a matter for a merits or damages phase of an arbitration. The purpose of the delivery of a Statement of Defence is to permit the parties to define and join issue on the matters before the Tribunal to facilitate the fair and timely resolution of the dispute. In the event that a responding Party is disagrees with the allegations in the Statement of Claim, its Statement of Defence serves as notice to the Investor and the Tribunal that there may be one or more "fundamental" issues in dispute. Once Canada has made its objections known by delivering the Statement of Defence, it will have the option of requesting a preliminary hearing for any issues raised in its Statement of Defence that it can prove would be both dispositive of the Claim and not more appropriately left for a hearing on the merits.

14. While the Investor rejects the arguments posed by Canada in its "Notice of Motion in respect of Jurisdictional Objections," it submits that if Canada is able to express its objections to the Statement of Claim in this Notice of Motion, it is certainly capable of filing its Statement of Defence at this time.

15. Finally, Canada espouses a novel arbitration approach that would permit it to object to the Investor's Claim on a preliminary basis and then submit a Statement of Defence in which, presumably, it could raise additional jurisdictional objections.

16. In essence, Canada is seeking the opportunity to raise jurisdictional challenges now through its submission on filing its Statement of Defence, then again through its Motion on Jurisdiction and then finally to have the opportunity to raise still further jurisdictional challenges arising out of the Investor's Statement of Claim again when it files its Statement of Defence after its motion is heard. The Investor submits for the reasons set out in its original Submission on the Filing of a Statement of Defence that such a process does not assist in the orderly hearing of this claim and such a result would be unfair to the Investor.

17. Thus, in accordance with Articles 19, 21 and 23 of the UNCITRAL Rules, the Investor submits that it would be appropriate for the Tribunal to order a close of the pleadings, and then, having received Canada's Statement of Defence, to determine whether Canada has raised any

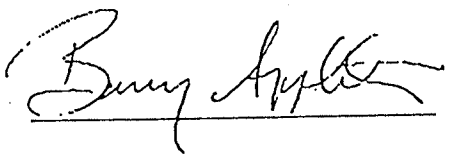
issues that should properly be determined on an preliminary basis. Such an approach was adopted by the NAFTA Investor-State Tribunals in two other NAFTA claims involving Canada, namely: *Re: Pope & Talbot, Inc.* and the *Government of Canada* and *Re: Ethyl Corp.* and the *Government of Canada*.

18. It is for this Tribunal to decide – once the pleadings have been closed and the issues in the Claim have crystalized – whether the Claim has merit. The Tribunal may evaluate the jurisdictional issues related to a particular portion of the Claim before the hearing on the merits– where its resolution is dispositive of the Claim – or upon a full hearing on the merits.

Relief Sought

For the foregoing reasons, the Investor submits that this Tribunal should order Canada to file its Statement of Defence within a maximum period of thirty days.

Submitted this 7th day of May, 2001



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